IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 608

CHARLES B. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
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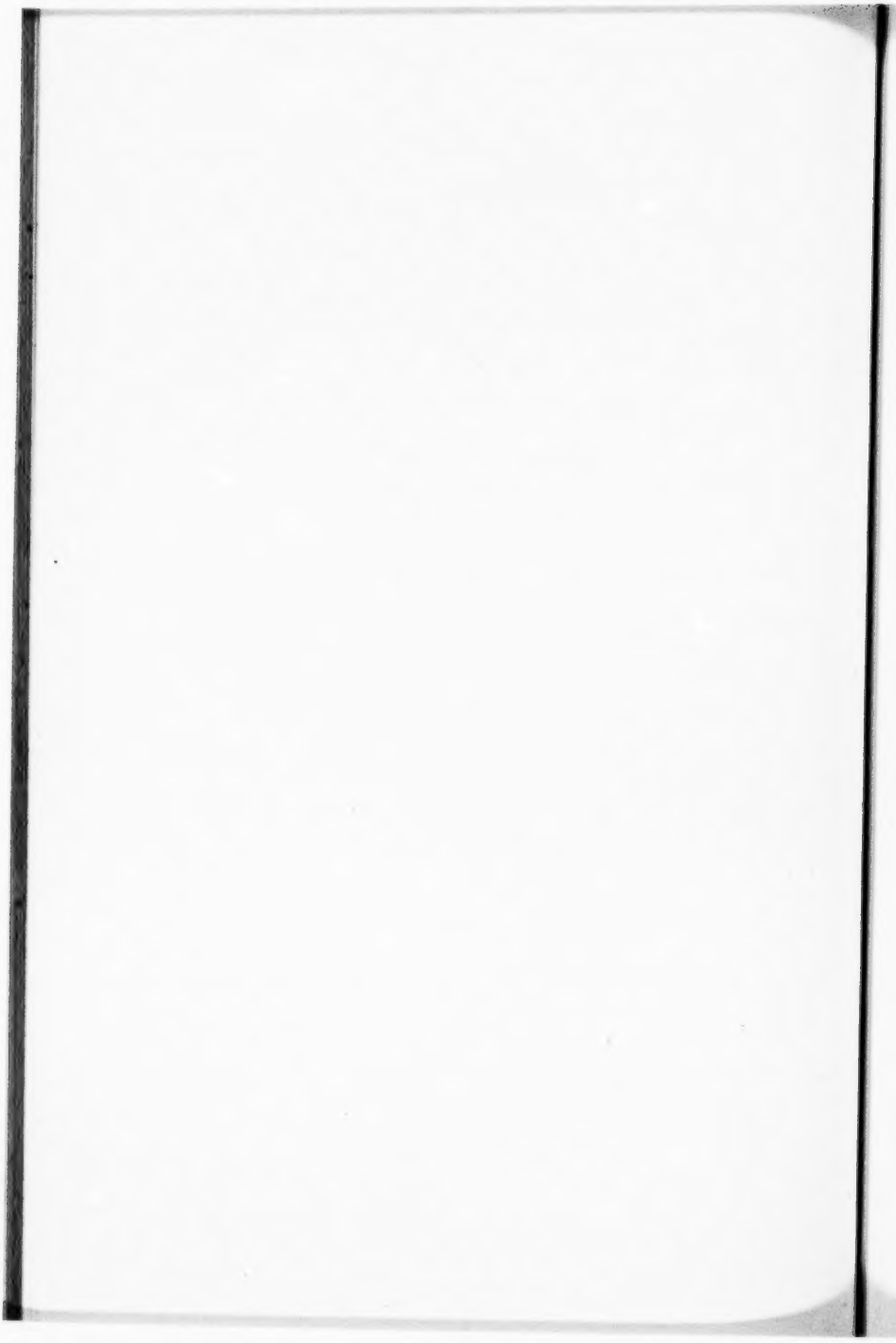

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Charles B. Van Dusen, by his counsel, respectfully prays that a writ of certiorari issue from this Court to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above-entitled

cause on October 18, 1943, which judgment reversed a decision of the United States Board of Tax Appeals.

A.

Summary Statement of the Matter Involved.

Petitioner filed a petition in the United States Board of Tax Appeals (now The Tax Court of the United States) on December 21, 1940, for the redetermination of deficiencies in individual income taxes determined by the Commissioner of Internal Revenue for the calendar years 1936 and 1937 in the amounts of $2,447.97 and $17,417.81, respectively. On the same date petitioner filed in the United States Board of Tax Appeals a petition for the redetermination of a deficiency in individual income tax for the calendar year 1938 in the amount of $6,516.79, likewise determined by the Commissioner of Internal Revenue. All of these deficiencies resulted in the main from the determination by the Commissioner that a portion of the income of a certain trust created by petitioner as donor was taxable to him and not to the trustees of said trust. The portion of the income of the trust which the Commissioner determined to constitute income taxable to petitioner was that portion used to pay premiums on certain life insurance policies owned by the trust under which the petitioner was not the insured.

The two above cases were consolidated for hearing and decision and were heard by the United States Board of Tax Appeals on September 18, 1941. On June 20, 1942,

the United States Board of Tax Appeals entered its Memorandum Findings of Fact and Opinion (R. 44) in which it held that the income of the trust, used to pay premiums on life insurance policies not on the life of the grantor, was not taxable to the grantor under Section 167(a) of the Revenue Acts of 1936 and 1938. Accordingly, on August 3, 1942, the United States Board of Tax Appeals entered its orders determining that there were no deficiencies in individual income tax due from petitioner for the calendar year 1936 and determining deficiencies in income tax for the calendar years 1937 and 1938 in the amounts of $11,293.43 and $611.05, respectively, which deficiencies were not based on the inclusion of any part of the income of said trust in the taxable income of petitioner, but related to issues which were conceded (R. 49).

On October 23, 1942, the Commissioner of Internal Revenue filed a petition for the review of these decisions of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Sixth Circuit. The said cause was entered and docketed in said Circuit Court of Appeals under the title "Commissioner of Internal Revenue, Petitioner, vs. Charles B. Van Dusen, Respondent," and numbered 9479 on said docket.

Thereafter on October 14, 1943, the cause came on for hearing in the United States Circuit Court of Appeals for the Sixth Circuit before the Honorable Florence E. Allen, the Honorable Elwood Hamilton, and the Honorable John D. Martin. At the same time, a case involving a similar trust created by Minnie B. Van Dusen was also heard by the Court. On October 18, 1943, a judgment was entered in both cases by said Circuit Court of Appeals reversing the decisions of the United States Board of Tax Appeals. No separate opinion was entered by said Court. The judgment aforesaid reads in full as follows:

"These companion cases came on to be heard upon the records and briefs and oral argument of counsel, it being stipulated by the parties in open court that the cases involve identical legal questions and that they should be forthwith heard, submitted and decided as one case.

On consideration whereof, it appearing that the Commissioner decided correctly in each case that the income of the trust for the taxable years, used to pay premiums on life insurance policies included in the trust estate, is taxable to the respondent under Sections 22(a) and 167(a) of the Revenue Acts of 1936 and 1938; Helvering v. Clifford, 309 U. S. 331; Helvering v. Horst, 311 U. S. 112; Helvering v. Stuart, 317 U. S. 154; Altmaier v. Commissioner, 116 Fed. (2d) 162 (C.C.A. 6), cert. denied 312 U. S. 706; Price v. Commissioner, 132 Fed. (2d) 95 (C.C.A. 6); Commissioner v. Willson, 132 Fed. (2d) 255 (C.C.A. 6):

It is ordered, adjudged and decreed that the decision of the United States Board of Tax Appeals, now the Tax Court of the United States, be and it hereby is reversed and the case is remanded to the Tax Court of the United States for further proceedings in accordance with the statute and the order of this court."

B.

Statement As to the Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. 347; and June 7, 1934 (48 Stat. 926).

C.

The Questions Presented.

The questions involved in this proceeding are as follows:

1. Whether the United States Circuit Court of Appeals for the Sixth Circuit was in error in reversing the decision of the United States Board of Tax Appeals that petitioner, as grantor, is not subject to taxation on the income of a trust used to pay premiums on life insurance policies not on his life under Section 167 of the Revenue Acts of 1936 and 1938.

2. Whether the United States Circuit Court of Appeals for the Sixth Circuit was in error in reversing the United States Board of Tax Appeals and deciding that petitioner, as grantor, is subject to taxation on the income of a long-term trust which is not distributable to him or to members of his family and in which he retains no rights of reversion and no elements of control under Section 22(a) of the Revenue Acts of 1936 and 1938.

3. Whether the United States Circuit Court of Appeals for the Sixth Circuit was in error in reversing the decision of the United States Board of Tax Appeals without any determination that the Board's findings of fact were not supported by the evidence or any specification of errors of law in the Board's opinion.

D.

Reasons Relied On for the Allowance of Writ.

1. The judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the instant case is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens*, 127 Fed. (2d) 973, affirming a Memorandum Opinion of the United States Board of Tax Appeals entered May 28, 1941. In the *Jergens* case the United States Board of Tax Appeals and the United States Circuit Court of Appeals for the Fifth Circuit determined that the grantor of an insurance trust was not taxable under Section 167 of the Revenue Acts of 1936 and 1938 in respect to the income of such trust, to the extent that such income was used to pay premiums on life insurance policies which were not upon her life. The insurance policies which constituted a part of the corpus of the trust in the *Jergens* case were upon the life of the husband of the grantor. The United States Circuit Court of Appeals for the Fifth Circuit likewise decided that the grantor had retained no economic interest in the policies and, accordingly, was not subject to tax on the income of the trust under Section 22(a) of the Revenue Acts of 1936 and 1938. Since the facts in the instant case are not distinguishable in any material particular from the facts in the *Jergens* case, there is a direct conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case and that of the Circuit Court of Appeals for the Fifth Circuit in the *Jergens* case. This conflict of decisions in a matter

of vital importance to grantors of insurance trusts warrants the granting of this petition.

2. The Court below has decided an important question of Federal law which has not been, but which should be settled by this Court, namely, that income from a trust, used to pay premiums on life insurance policies, not on the life of the grantor, included in the trust estate, is taxable to the grantor.

Neither Section 167 nor 22(a) of the Revenue Acts of 1936 and 1938 provide for the taxation of the income of trusts to the grantors thereof in circumstances such as those here present. Section 167(a)(3) provides that a grantor shall be subject to tax on the income of a life insurance trust where the policies of life insurance in question are on the life of the grantor himself. The Court has erroneously held that this section imposes tax on the grantor where the policies are *not* on his life. This decision is in direct contravention of the statute. This application of Section 167 to the facts of the instant case constitutes a misinterpretation of a Federal statute of sufficient gravity to warrant the intervention of this Court.

3. While there is no printed opinion in the Court below, the citation of authorities in the judgment indicates that the Court misinterpreted and misapplied a decision or decisions of this Court.

In the case of *Helvering v. Clifford*, 309 U. S. 331, cited by the Court below, this Court determined that the income of a short-term trust over which the grantor had retained extensive elements of control and the corpus of which reverted to him upon its termination was taxable to the grantor under the provisions of Section 22(a) of the

Revenue Act of 1934. The Circuit Court of Appeals for the Sixth Circuit has erred in attempting to apply this principle in the instant case where the trust is not a short-term trust, where the grantor retained no element of control whatsoever, where there is no possibility of reversion of the trust corpus to him *and where the income in question is neither distributable to him nor to any member of his family nor expendable for his benefit.* The application of Section 22(a) to the facts of the instant case threatens an extension of the principle enunciated by this Court in the *Clifford* case to trusts possessing real substance and where the grantor has retained no substantial economic benefits. This unwarrantably expands by judicial action the class of trusts, the income of which was determined by the Congress to be taxable to the grantors thereof. Such an extension of the application of Section 22(a) threatens to impose upon the grantors of all trusts created for the benefit of members of their families, tax liabilities never contemplated in the enactment of the Revenue Statutes. Moreover, the decision in the instant case constitutes an extension of the application of the Clifford principle to a point much beyond that which has been approved by certain other Circuit Courts of Appeal. The seriousness of this threatened imposition upon trust grantors and the substantial variations among the Circuit Courts of Appeal in their interpretation of the Clifford principle likewise warrant the intervention of this Court.

4. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decision of the United States Board of Tax Appeals in the instant case through the entry of a judgment stating that the income of the trust in question was taxable to petitioner under Sections 22(a) and 167(a) of the Revenue Acts of 1936 and 1938 and remanded the case to the United States Board of Tax

Appeals without the entry of any opinion and without setting forth any reasons for its determination that the decision of the United States Board of Tax Appeals was erroneous. The judgment of the Circuit Court of Appeals for the Sixth Circuit is not consistent with the facts found by the Board of Tax Appeals. Nevertheless, the Circuit Court of Appeals did not determine that the Board's findings of fact and opinion were unsupported by the evidence nor did it find facts supporting its own judgment. This action constitutes a reversible error and departs so far from the accepted and usual practice of appellate tribunals as to warrant the intervention of this Court.

E.

Assignments of Error.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust used to pay premiums on life insurance policies not on his own life, under Section 167(a) of the Revenue Acts of 1936 and 1938.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a long-term trust which is not distributable to him, nor to members of his family and in which he retained no rights of reversion and no elements of control, under Section 22(a) of the Revenue Acts of 1936 and 1938.

3. The United States Circuit Court of Appeals for the

Sixth Circuit erred in reversing the decision of the United States Board of Tax Appeals without the entry of an opinion specifying findings of fact in support of its judgment or specifying errors of law in the Board's opinion.

WHEREFORE, petitioner prays that a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I.

Opinions of the Courts Below.

The United States Board of Tax Appeals entered its

Memorandum Findings of Fact and Opinion in this case on June 20, 1942. Said Memorandum Findings of Fact and Opinion were not reported. The opinion of the Board upheld the contentions of petitioner and no dissenting opinion was filed. On October 18, 1943, the United States Circuit Court of Appeals for the Sixth Circuit entered a judgment reversing the decision of the Board of Tax Appeals and remanding the case to the Board for entry of decision. The United States Circuit Court of Appeals did not enter any opinion in this cause and its judgment is reported in 138 Fed. (2d) 510.

II.

Statement As to the Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938), 28 U. S. C. 347, and June 7, 1934 (48 Stat. 926).

III.

Statement of the Case.

On February 26, 1931, Charles B. Van Dusen, the petitioner herein, created an irrevocable trust known as "The Charles B. Van Dusen Insurance Trust," to which he transferred certain securities and certain life insurance

policies owned by him and issued on the life of his wife (R. 28). A portion of the income of the trust was used during the years 1936, 1937 and 1938, to pay premiums on these policies (R. 28). Upon the transfer of said securities and insurance policies in trust, the petitioner completely relinquished all rights of ownership and economic benefits therein and retained no reversionary interest in any part of the corpus of the trust whether the original corpus or accumulations added thereto. The petitioner was not a trustee of the trust and retained no powers with respect to its control or management (R. 30-42). The only interest petitioner, as grantor, had in the trust was that, in the event his wife predeceased him, he became entitled to one-half of the net income received by the trust, subsequent to that event. The trust was irrevocable, not subject to amendment, and continued throughout the lifetime of the grantor and until remaindermen, the grantor's children, attained specified ages (R. 30-42).

In notices of deficiency relating to the three said years, 1936, 1937 and 1938, the Commissioner of Internal Revenue determined that the income of the trust used to pay insurance premiums was taxable to petitioner as grantor of the trust. Petitioner appealed from these determinations to the United States Board of Tax Appeals which, in a Memorandum Findings of Fact and Opinion entered on June 20, 1942, sustained petitioner's contention that he was not subject to tax in respect to the trust income used to pay insurance premiums. The Commissioner of Internal Revenue appealed from the decision of the Board to the United States Circuit Court of Appeals for the Sixth Circuit, which, on October 18, 1943, without an opinion, entered a judgment reversing the decision of the Board of Tax Appeals and remanding the case to the Board for entry of decision.

IV.

ARGUMENT.

1. The United States Circuit Court of Appeals for the Sixth Circuit erred in holding that the income of an insurance trust used to pay premiums on life insurance policies not on the life of the grantor is taxable to the grantor, in conflict with a decision of the United States Circuit Court of Appeals for the Fifth Circuit.

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit in the instant proceeding, holding that income of The Charles B. Van Dusen Insurance Trust used to pay premiums on life insurance policies on the life of the grantor's wife was taxable to him, is in conflict with decisions of the United States Board of Tax Appeals in other cases and the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens*, 127 Fed. (2d) 973 (affirming the Memorandum Opinion of the Board of Tax Appeals entered May 28, 1941). In the *Jergens* case the taxpayer had created a trust to which she had transferred certain securities, together with life insurance policies on the life of her husband. The trust agreement provided that the income of the trust should be used, first, to pay the premiums on the life insurance policies and a small annuity to a named beneficiary. Any remaining net income was to be paid to the taxpayer during her lifetime. The taxpayer's husband, the insured under the policies, was given the right to withdraw any part of the corpus at any time,

except the policies themselves, and the power to alter, modify or amend the trust agreement. The trust was to terminate upon the death of the taxpayer with the corpus distributable to her husband, if living, and otherwise, to her issue and other beneficiaries. Upon reviewing these facts the Board of Tax Appeals decided that the income of the trust used to pay the insurance premiums was not taxable to the grantor under any provision of Section 167(a) of the Revenue Acts of 1936 and 1938. It held that Section 167(a)(3) explicitly provides that the grantor shall be taxable on the income of a life insurance trust used to pay premiums on policies of life insurance on his *own* life and was therefore inapplicable. On appeal the United States Circuit Court of Appeals for the Fifth Circuit affirmed the Board and held that the income in question was not taxable to the grantor under any provision of Section 167(a) and, further, that it was not taxable to the grantor under Section 22(a). The Court determined that the grantor had retained no economic interest in the policies in question.

The facts in the instant proceeding are identical with the facts in the *Jergens* case in all material respects. In both cases the grantor had established a funded life insurance trust which provided that the income was to be used as far as necessary to pay premiums on life insurance policies *not* on the life of the grantor. In the *Jergens* case any excess income was payable to the grantor. In the instant case such excess income was payable to the grantor only at the discretion of the trustees who had an interest adverse to the grantor. (Here the excess income of the trust was not in fact distributed and the Commissioner of Internal Revenue does not seek to tax it to the grantor.) After the death of the insured the entire income of the *Jergens* trust was payable to the grantor whereas

under similar circumstances one half of the income of the Van Dusen Trust was payable to the grantor. Various powers to withdraw corpus and to alter, amend, and revoke were lodged by the grantor of the *Jergens* trust in her husband, but no such powers were retained by the grantor or given to his wife or any other person in the instant case. In so far as the application of Section 167(a) is concerned, the facts of the *Jergens* case and the instant case are indistinguishable. Neither did the grantor of either trust retain any economic benefits which would subject him to taxation under Section 22(a) although in the *Jergens* case certain powers were lodged by the grantor in her spouse, which was not true in the Van Dusen Trust.

It is therefore apparent that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the *Jergens* case. This judgment is likewise in conflict with the decisions of the United States Board of Tax Appeals in the cases of *Lucy A. Blumenthal*, 30 B. T. A. 591 (reversed on another issue, 296 U. S. 552), and *Gail H. Baldwin*, 36 B. T. A. 364.

2. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust used to pay premiums on life insurance policies not on his life, under Section 167(a) of the Revenue Acts of 1936 and 1938.

In its judgment issued in this proceeding the United States Circuit Court of Appeals for the Sixth Circuit determined that petitioner was taxable on the income of The Charles B. Van Dusen Insurance Trust under Section 167(a) of the Revenue Acts of 1936 and 1938, despite the fact that the insurance policies in the trust were not on the life of the petitioner. Section 167(a) provides as follows:

> "(a) Where any part of the income of a trust—
>
> (1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or
>
> (2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or
>
> (3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(o), relating to the so-called 'charitable contribution' deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor."

Since the income of the trust here in question was used to pay insurance premiums, it is apparent that such income was neither distributed to the grantor nor held or accumulated for future distribution to him. Clauses (1) and (2) of the quoted statute are therefore inapplicable. Clause (3) is inapplicable by its very terms since it applies only to portions of trust income used to pay premiums upon policies of insurance on the life of the grantor. The policies owned by The Charles B. Van Dusen Trust were on the life of the grantor's spouse. It is apparent, therefore, that Section 167(a) is not applicable to the facts of this proceeding and that the United States Circuit Court of Appeals for the Sixth Circuit is in error in so determining. That Section 167(a) is inapplicable to trusts of this type was decided, not only by the United States Board of Tax Appeals in its decision in the instant proceeding, but by the same tribunal in the cases of *Lucy A. Blumenthal, supra*, and *Gail H. Baldwin, supra*, and by the Circuit Court of Appeals for the Fifth Circuit in the case of *Commissioner of Internal Revenue v. Amy B. Jergens, supra*.

3. The United States Circuit Court of Appeals for the Sixth Circuit erred in determining that petitioner is subject to tax on the income of a trust under Section 22(a) of the Revenue Acts of 1936 and 1938 in the absence of any finding that he retained any economic interest in such trust.

The United States Board of Tax Appeals had before it the question of whether petitioner was subject to tax on the income of The Charles B. Van Dusen Trust under Section 22(a) of the Revenue Acts of 1936 and 1938. However, the Board did not determine that petitioner was subject to tax under this section nor did it make any findings of fact which would support such a conclusion. The record in this proceeding makes it clear that the trust in question was a long-term trust which continued throughout the lifetime of the grantor and until his children attained the age of forty (40) years; that the income in question was not distributable either to the grantor or to any member of his family; that the grantor was not a trustee and that he retained no elements of control whatsoever over the management and operation of the trust. Moreover, the findings of fact of the United States Board of Tax Appeals are bare of any suggestion that the grantor in the instant case retained for himself, or could derive from the operation of the trust, any economic benefit whatsoever. The fact that the grantor's wife created a similar insurance trust does not alter this conclusion, since he was not a beneficiary of his wife's trust. These were not reciprocal or cross trusts, since neither spouse could derive any benefit from the trust set up by the other. Nevertheless, the United States

Circuit Court of Appeals for the Sixth Circuit, in the absence of any facts of record or any findings of fact by the Board supporting such a conclusion, held that the income of the trust was taxable to the grantor under Section 22(a).

Aside from the procedural error involved in such a determination, it is submitted that the Circuit Court of Appeals for the Sixth Circuit in its decision has attempted to extend the application of the principle laid down by this Court in the case of *Helvering v. Clifford*, 309 U. S. 331, far beyond any limits contemplated by this Court. In the *Clifford* case this Court held that the income of a short-term trust was taxable to the grantor where he retained control by making himself the trustee, where the income was distributable to his wife and therefore available for use "within an intimate family group," and where the corpus was to revert to him upon termination. It is apparent that the extension of what has come to be known as the "Clifford principle" to trusts of the type present in the instant proceeding threatens to impose upon the grantors of family trusts tax liabilities never contemplated by the Congress in the enactment of the Revenue Statutes, nor, it is respectfully submitted, by this Court in the decision of the *Clifford* case. If the grantor of a trust is to be taxed upon the income thereof despite the fact that the trust continues throughout his lifetime, that the income cannot be used by him or for his benefit or be distributed to any member of his family for current use within the family group and despite the further fact that he has divorced himself completely from the control of the trust, then, in effect, the creation of trusts for the benefit of grantors' children or other members of their families will, in practice, be made impossible.

Finally there has developed among the Circuit Courts of Appeal variations in the interpretation of the decision of this Court in the *Clifford* case which have resulted in widely differing applications of the Clifford principle in different parts of the country. This fact was recognized by the Circuit Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue v. Katz*, decided November 24, 1943, which stated:

> "We think it would be well near useless to attempt to analyze the cases which have sought to apply or distinguish the doctrine of the *Clifford* case, and we shall not do so. It appears from such cases that there is some contrariety of opinion as to the extent to which the doctrine of that case should be given effect."

In the instant case the Circuit Court of Appeals for the Sixth Circuit has applied Section 22(a) to a situation where it seems clear that the Circuit Court of Appeals for the Seventh Circuit would have found it inapplicable. This "contrariety" of opinion among the Circuit Courts of Appeals results in the imposition of discriminatory burdens upon the grantors of trusts living in certain parts of the United States.

4. The United States Circuit Court of Appeals for the Sixth Circuit erred in reversing the decision of the United States Board of Tax Appeals without analysis or criticism of the Board's findings of fact, without the finding of additional facts supporting its own judgment and without specification of errors of law in the Board's opinion.

In this proceeding the United States Board of Tax Appeals entered a Memorandum Findings of Fact and Opinion in which the Board analyzed the provisions of The Charles B. Van Dusen Insurance Trust. The Board found, as a fact, that the trust in question was not a short-term trust, that its income was not currently distributable to the grantor and could not be accumulated for future distribution to him and that no part of the income of the said trust had ever been distributed to him or to any other person. The Board did not find that the grantor retained any control over the trust of which he was not one of the trustees, that he retained any reversionary interest in the corpus or income thereof or that he enjoyed any economic benefit of any kind as a result of the creation of the trust, although the application of Section 22(a) of the Revenue Act of 1938 was an issue in this proceeding. The United States Circuit Court of Appeals for the Sixth Circuit entered its judgment reversing the Board without any opinion analyzing the findings of fact entered by the Board and without finding any additional facts. Nevertheless, the Court ruled as a conclusion of law that the income of the trust was taxable to the grantor under Section 22(a), a result which, it is submitted, is erroneous and improper in the absence of any factual determination supporting the proposition that the grantor retained any interest or advantage from the

trust. In similar cases, other Circuit Courts of Appeal have declined to review the finding of fact of the trial Court that the grantor retained no economic benefit warranting taxation under Section 22(a). See *Commissioner of Internal Revenue v. Katz*, decided by the United States Circuit Court of Appeals for the Seventh Circuit on November 24, 1943. Furthermore, the United States Circuit Court of Appeals for the Sixth Circuit reversed the determination of the Board that the income of the trust in question was not taxable to the grantor under Section 167(a) without any opinion specifying the errors of law, if any, committed by the Board in reaching its result.

The Court accordingly erred in basing its judgment on a conclusion which is not supported by any facts of record and is not supported by any facts found by the tribunal below. Moreover, the reversal of the decision of the United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Sixth Circuit, without the entry of any opinion analyzing the facts and the principles of law relied upon by the Court below, is contrary to sound and established judicial procedure of appellate tribunals. It is recognized that in affirming a lower Court, an appellate Court is not required to issue a written opinion. Here, however, the lower Court was reversed by the appellate authority. This Honorable Court has recognized the impropriety of a judicial tribunal reversing a quasi judicial administrative body without a statement of the grounds of its decision, both as to the facts and the law. *Public Service Commission of Wisconsin v. Wisconsin Telephone Company*, 289 U. S. 67; *Railroad Commission of Wisconsin v. Maxcy*, 281 U. S. 82.

The failure of the United States Circuit Court of Appeals for the Sixth Circuit to find facts supporting its conclusion and to explain the basis of its reversal of the decision of the Board constitutes a serious and unwarranted departure from the usual course of judicial proceedings.

WHEREFORE, in the light of the foregoing reasons, it is respectfully urged that the petition of Charles B. Van Dusen for writ of certiorari filed herewith be granted by this Honorable Court.

Respectfully submitted.

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(13)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 44–48) is a memorandum opinion not officially reported. The opinion of the Circuit Court of Appeals (R. 61) is reported in 138 F. 2d 510.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 18, 1943. (R. 61.) The petition for a writ of certiorari was filed January 15, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, when the taxpayer created a trust to pay the premiums on insurance policies on the life of his wife, and at the same time the wife created a similar trust to pay the premiums on insurance policies on the life of the husband, the income of the taxpayer's trust so employed constitutes taxable income of the taxpayer under Sections 22 (a) and 167 of the Revenue Acts of 1936 and 1938.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The taxpayer on February 26, 1931, created an irrevocable trust of which his four sons were trustees. He assigned to the trust 10,000 shares of the common stock of the S. S. Kresge Company and seven life insurance policies owned by him in the aggregate amount of $200,000 on the life of his wife, Minnie B. Van Dusen. (R. 45.)

The trust instrument, which is set out in full as Joint Exhibit A–1 (R. 30–43), provided in paragraphs 3 and 4 that the trustees should collect the income of the trust and apply the same, insofar as necessary, to the payment of the premiums upon the assigned insurance policies on the life of the wife (R. 31–32, 45). Should

the income of the trust exceed the amount necessary for the payment of the premiums the trustees had absolute discretion either to pay the excess to the taxpayer or to add the same to the corpus of the trust (R. 32, 46).

The trust further provided (Par. 5) that on the death of Minnie B. Van Dusen the trustees should collect the sums payable on the life insurance policies on her life and add them to the principal of the trust. Fifty percent of the net income of the augmented trust would be distributed to the grantor for life, and fifty percent would be divided equally among his surviving children. (R. 33, 46.)

On the death of the taxpayer, the trustees were directed to divide the trust estate into four equal parts for the benefit of the taxpayer's four sons, paying to each of them the income until he attained the age of 40, and on attaining such age, his share of the principal. There were detailed provisions for the distribution of the corpus and income of the trust, if any son should predecease the taxpayer, or die before reaching the age of 40, to the surviving issue, or spouse of each son, or if none, to the surviving brothers. (Par. 6, R. 33–39, 46.)

The trustees were further empowered to use any portion of the principal of the trust to purchase property from or to make loans to the executors and/or trustees of the estate of Minnie B. Van Dusen, if deemed by them to be for the

best interests of the beneficiaries of the trust (R. 39–40).

It also appears from the companion case of *Minnie B. Van Dusen* v. *Commissioner,* No. 609, heard, submitted, and decided by the Circuit Court of Appeals as one case with the instant case (R. 61), that on February 28, 1931, two days after the execution of the trust instrument by Charles B. Van Dusen, his wife, Minnie B. Van Dusen, executed to the same trustees a corresponding instrument of trust (No. 609, R. 24–39) to pay the premiums on his life insurance. In her case the fund of the trust consisted of 31,250 shares of the S. S. Kresge Company stock and insurance policies on the life of her husband, Charles B. Van Dusen, in the aggregate account of $900,000. (No. 609, R. 40–41.) The net income of this trust was payable entirely to Minnie B. Van Dusen upon the death of the husband and the collection of the insurance upon his life. The trustees of the trust were empowered to purchase property from or to loan money to the estate of the husband, Charles B. Van Dusen. The other provisions of the trust were substantially identical with those of the trust created by Charles B. Van Dusen.

The trustees of the two trusts reported as taxable income of the trusts the income involved in this case and in No. 609. (R. 12, 14, 22; No. 609, R. 10, 11, 19.) The Commissioner of Internal Revenue determined that the portion of the in-

come of the trust created by the taxpayer used to pay the premiums on the life insurance of the wife constituted taxable income of the taxpayer. (R. 10–15, 20–23.) He also determined that the portions of the income of the trust created by the wife used to pay the premiums on the life insurance of the husband constituted taxable income of the wife. (No. 609, R. 8–12, 17–20.) The Board of Tax Appeals upset this determination with respect to each of the trusts. (R. 44–48; No. 609, R. 39–44.) The Circuit Court of Appeals in one judgment (R. 61; No. 609, R. 55) reversed and remanded each case to the Tax Court for "further proceedings in accordance with the statute and the order of this court."

ARGUMENT

The decision in the present case is not, as taxpayer contends (Br. 14–16), in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Commissioner* v. *Jergens*, 127 F. 2d 973. The court in that case said (p. 974), "Each case depends for decision on its own peculiar facts," and the facts in the two cases are entirely different. That case also involved a trust to pay the premiums on the insurance on the life of the spouse of the settlor, but the terms of the trust were substantially different from those of the trust here. More important, there was not in that case, as in this, a practically simultaneous trust created by the spouse of the

settlor to pay the premiums on the insurance on the life of the settlor. The existence of these two trusts, one by the husband to pay the premiums on the wife's life insurance, and the other by the wife to pay the premiums on her husband's life insurance, together with the other provisions of the trusts, the trustees and the beneficiaries of each trust being all members of the same family group, clearly distinguishes the present case from the *Jergens* case.[1]

The decision below is in full accordance with the principles declared by this Court in *Helvering* v. *Clifford,* 309 U. S. 331; *Helvering* v. *Horst,* 311 U. S. 112; and *Helvering* v. *Stuart,* 317 U. S. 154. Whether the trust created by the taxpayer and that created by his wife be considered separately or together, the settlor of each trust continued to enjoy the economic benefit of the trust, since the income thereof was employed for the further security of the settlor, the other spouse and their intimate family. By means of the trust the settlor obtained a satisfaction procurable only by the expenditure of money or money's worth. At the best there was only "a temporary reallocation of income within an intimate family group." *Helvering* v. *Clifford, supra,* at page 335. The trustees of each trust were the settlor's four sons. The income of each trust was used to pay the premiums

[1] For the same reason the present case is distinct from *Blumenthal* v. *Commissioner,* 30 B. T. A. 591, and *Baldwin* v. *Commissioner,* 36 B. T. A. 364, cited by taxpayer at Brief 16.

on the insurance on the life of the settlor's spouse. Any excess of income was either to be accumulated or to be paid to the settlor of the trust. On the death of the insured spouse, the insurance was to be collected, and the income of the augmented trust was to be paid in part or in whole to the settlor, the remainder to be held for the benefit of the sons and their respective families. Provision was even made for rendering financial aid by each trust to the estate of the deceased spouse.

But the two trusts in fact were closely related. They were executed within two days of each other; in each the four sons of the two settlors were trustees and ultimate beneficiaries. The corpus of each trust was stock in the same corporation. The verbiage of each trust was identical. The only substantial difference was that the income of the husband's trust was to pay the premiums on the insurance on the life of the wife, while that of the wife's trust was to pay the premiums on the insurance on the life of the husband. Also, in the husband's trust he was to have only fifty percent of the income of the augmented trust, while the wife was to have one hundred percent of the income of her augmented trust. It is thus clear that these two instruments must be considered together. *Helvering* v. *LeGierse*, 312 U. S. 531; *Whiteley* v. *Commissioner*, 120 F. 2d 782 (C. C. A. 3d); *Lehman* v. *Commissioner*, 109 F. 2d 99 (C. C. A. 2d).

It is not correct, as taxpayer asserts (Br. 19),

that neither spouse was a beneficiary or derived any benefit from the trust set up by the other spouse. The trust of each spouse was used to pay the premiums on the life insurance of the other spouse. This constituted a benefit to the one whose life insurance was paid, which is fully recognizable for tax purposes. Revenue Acts of 1936 and 1938, Sec. 167 (a) (3), Appendix, *infra; Burnet* v. *Wells*, 289 U. S. 670, 679–681. If under the normal procedure the husband had created a trust for the purpose of paying premiums on his own life insurance, and the wife had created a trust to pay premiums on her life insurance, it is clear that the income of the trusts so used would be taxable to the respective grantors. Revenue Acts of 1936 and 1938, Sec. 167 (a) (3). Individual surtaxes should not be avoided merely because the income of each trust was used to pay the insurance on the life of the other spouse.

The taxpayer complains (Br. 22–23) that the Circuit Court of Appeals did not analyze the facts found by the Board or the principles of law relied upon by the Board. But it is not true that the court made findings of fact of its own or disregarded the facts found by the Board. The facts in the case were all stipulated and the court below obviously accepted the Board's findings as being in accord with the stipulation. The court reversed the Board on a question of law. There is accordingly no merit to any suggestion that the

court exceeded its judicial authority in reviewing the Board's decision.

CONCLUSION

There is no conflict and the decision below is correct. The petition for certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
* * *

* * * * * *

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such

part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question".

Sections 22 (a) and 167 of the Revenue Act of 1938, c. 289, 52 Stat. 447, are identical with the same sections in the Revenue Act of 1936.

Treasury Regulations 94, relating to the Income Tax under the Revenue Act of 1936:

> Art. 167-1. (as amended by T. D. 4759, 1937-2 Cum. Bull. 117, and T. D. 4860, 1938-2 Cum. Bull. 184) *Trusts in the income of which the grantor retains an interest—(a) Scope.*—Section 167 prescribes that the income, or any part of the income, of certain trusts shall be taxed to the grantor, not because the grantor has retained a certain interest in the *corpus* of the trust (as in section 166), but because of his retention of a certain interest in the *income* of the trust. This article deals with the taxation of such income. The term "income," as used in this article, means any part or the whole of the income of the trust.

(*b*) *Test of taxability to the grantor.*— The test prescribed by the Act as to the sufficiency of the grantor's retained interest in the trust income, resulting in the taxation of such income to the grantor, is whether he has failed to divest himself, both permanently and definitively, of every right which might, by any possibility, enable him to have such income, at some time, distributed to him, either actually or constructively. Such a distribution to the grantor occurs within the meaning of section 167 if the income is paid to him or to another in obedience to his direction or if the income is applied in payment of premiums upon policies of insurance on the grantor's life.

For the purposes of this article, the sufficiency of the grantor's retained interest in the income is not affected by the fact that the grantor has provided that the right to so effect or direct the distribution of income is, or may at some future time be, vested in any person (either alone or in conjunction with the grantor) not having a substantial interest in the income adverse to the grantor.

If the grantor has retained any such interest in the income, such income is taxable to the grantor regardless of—

(1) whether it may be distributed currently or accumulated for future distribution;

(2) whether such distribution, either current or subject to accumulation, is fixed by the trust instrument or is dependent on an exercise of discretion;

(3) whether, if such distribution is in any way effected by or dependent on an exercise of discretion, the person exercising the

discretion is the grantor or a person not having a substantial interest in the income adverse to the grantor, or both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(4) the time or times of such distribution, whether within or without the taxable period, whether conditioned on the precedent giving of notice, or on the elapsing of an interval of time, or on the happening of a specified event, or otherwise;

(5) when the trust was created.

Thus the inclusion of any trust within the scope of section 167 is based on the fact that the grantor has retained an interest in the income therefrom by which he is, or may be enabled at some time, to receive its benefits. But the provisions of section 167 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the trust income. If, for example, trust income is applied in satisfaction of the grantor's legal obligation whether to pay a debt, to support dependents, to pay alimony, to furnish maintenance and support, or otherwise, such income is in all cases taxable to the grantor.

If the grantor strips himself permanently and definitively of every such interest retained by him, the income of the trust realized after such divesting takes effect is not taxable to the grantor but is taxable as provided in sections 161 and 162.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the income. There is to be excluded in comput-

ing the net income of the grantor only that part of the trust income in the disposition of which such person has a substantial interest adverse to the grantor.

(c) *Income and deductions.*—If, as to any of the income, the test of taxability to the grantor is satisfied, such income shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to such income as he would have been entitled had such income been distributable currently to him.

Article 167–1 of Treasury Regulations 101, relating to the Income Tax under the Revenue Act of 1938, is, with minor verbal differences not material to the present case, identical with Article 167–1 of Treasury Regulations 94, quoted above.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 608

CHARLES B. VAN DUSEN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

JOSEPH E. DAVIES,
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Counsel for Petitioner.

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INTRODUCTORY STATEMENT

On January 15, 1944, petitioner filed a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and a brief in support thereof. On February 8, 1944, the respondent filed a brief in opposition to the granting of this petition. This brief is filed by petitioner for the purpose of replying to the arguments set forth in respondent's brief in opposition.

ARGUMENT

1. The decision of the Circuit Court of Appeals for the Sixth Circuit in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the *Jergens* case.

Respondent in his brief in opposition denies petitioner's contention that the decision of the United States Circuit Court of Appeals for the Sixth Circuit in this case is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *Commissioner v. Jergens*, 127 Fed. (2d) 973. He bases his argument on the assertion that the facts in the two cases are different. It is true that the detailed provisions of the two trusts differ and these differences were pointed out in petitioner's original brief. However, both the trust in this case and the trust in the *Jergens* case were irrevocable insurance trusts in which the policies were not on the life of the grantor, and in which the insurance premiums were to be paid from the trust income. The excess income of the trusts, if any, was payable to the grantors, in the *Jergens* case by the terms of the trust instrument and in the instant case at the discretion of trustees, who were adversely interested. In other words, all of the facts which are material to the application of Section 167(a) of the Revenue Acts of 1936 and 1938 to these trusts were substantially the same in the two cases. Respondent does not refer to any factual difference between the two cases which has any bearing on the application of this section. Nevertheless, the Circuit Court of Appeals for the Sixth Circuit determined that the income of the trust here in

question was taxable to the grantor under Section 167(a) in direct conflict to the decision of the Court in the *Jergens* case.

Moreover, respondent goes on to argue that the decision of the Circuit Court of Appeals in this case is in accordance with the principle established by this Court in *Helvering v. Clifford*, 309 U. S. 331. To support such a contention he must argue that the grantor of this trust retained some control over it or some economic benefit derivable from it. He does in fact assert such economic benefit, ignoring the fact that The Tax Court, in its findings of fact in this case, did not find that the grantor had retained or could derive any economic benefit from the establishment of the trust and did not find any fact which would support a decision that the grantor was taxable as to the income of the trust under Section 22(a) of the Revenue Acts of 1936 and 1938. Consequently, it may fairly be said that the Circuit Court of Appeals for the Sixth Circuit, in determining that the grantor was taxable under Section 22(a) in the absence of a finding of fact by the lower Court of any of the characteristics which have caused other Circuit Courts of Appeals to apply the Clifford principle, was in conflict with the decision not only in the *Jergens* case but in other cases decided under the principle of the *Clifford* case.

Respondent argues that the Van Dusen Trust was a family trust resulting merely in "a temporary reallocation of income within an intimate family group". It may be pointed out, however, that the trust in the *Jergens* case was likewise a family trust set up by a wife for the benefit of her husband, containing insurance policies on his life and providing for the distribution of the corpus to the husband, if living at the termination of the trust upon

the death of the wife. The Circuit Court of Appeals for the Fifth Circuit, reviewing these facts, determined that the grantor had retained no economic benefit in the trust and that she was not subject to taxation under Section 22(a). Such decision is, it is submitted, in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in this case.

2. The trusts here involved were not reciprocal trusts since neither spouse benefited from the trust set up by the other.

Respondent contends that the insurance trusts created by the petitioner and his wife each provided a reciprocal benefit for the other spouse, because "the trust of each spouse was used to pay the premiums on the life insurance of the other spouse". He concludes that "this constituted a benefit to the one whose life insurance was paid" (Br. 8). Respondent misunderstands the facts. The trust created by the petitioner was not for the purpose of paying premiums "on the wife's life insurance", (Br. 6) since the insurance policies placed in his trust by petitioner were his own property. They were in no sense his wife's life insurance. Petitioner's wife was merely the insured under the policies placed in the trust and had no incident of ownership or economic interest in them. She could, therefore, derive no benefit from the fact that her husband had set up a trust, the income of which was to be used to pay the premiums on these life insurance policies which *she did not own*. The same situation is true of the trust created by petitioner's wife.

Neither spouse, therefore, received or could receive any direct economic benefit from the trust created by the

other spouse. The only benefits accruing from the creation of these trusts were the benefits resulting from the building up of an estate for the children of the two settlors. It is even immaterial that the property in which this estate was invested was insurance. If such an economic benefit warrants the taxation of the trust income to the settlors in this case, then it would follow that the income of every family trust created by the parents for the ultimate benefit of their children, regardless of the nature of the investment of the trust corpus, should be taxable to the parents who created it.

3. If, as respondent contends, this case must be decided "on its own peculiar facts", then the Circuit Court of Appeals for the Sixth Circuit erred in reviewing the Tax Court's determination of the facts and reversing its decision.

In attempting to distinguish this case from the *Jergens* case respondent argues vigorously that the facts of the two cases are different and states, quoting the decision in the *Jergens* case, that "each case depends for decision on its own peculiar facts". If respondent is correct in taking this position, then it follows that the Circuit Court of Appeals for the Sixth Circuit in reversing the decision of The Tax Court must have substituted its own interpretation of the facts for the factual determination made by The Tax Court. That Court, as already stated, had made no findings of fact upon which an application of Section 22(a) could be predicated. This action, it is submitted, is in contravention of the principle of finality in The Tax Court's findings of fact recently re-emphasized by this Court in its decision in *Dobson v. Commissioner of Internal Revenue*, decided December 20, 1943.

Respondent attempts to extricate himself from this position by the statement that the Court accepted the Board's findings and merely "reversed the Board on a question of law" (Br. 8). If, however, the Circuit Court of Appeals for the Sixth Circuit merely accepted the findings of fact made by The Tax Court, it either had no basis for the decision which it reached, or arrived at that decision by enunciating a principle of law in conflict with the decision in the *Jergens* case. In so far as the Court based its decision on an application of Section 167(a), it necessarily reached a decision in conflict with the decision of the *Jergens* case. In so far as it based its decision on an application of Section 22(a), it did so on findings of its own based on a redetermination of the facts before it, since, as already pointed out, there were no findings of fact by The Tax Court supporting such a conclusion.

CONCLUSION

WHEREFORE, it is respectfully urged that the petition of Charles B. Van Dusen for a writ of certiorari be granted.

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